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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10 **(HONORABLE IRMA E. GONZALEZ)**

11 UNITED STATES OF AMERICA,	)	Case No. 08CR0283-IEG
	)	
12 Plaintiff,	)	DATE: September 16, 2008
	)	TIME: 9:00 a.m.
13 v.	)	
	)	MR. KELLY'S PROPOSED JURY
14 FRANCISCO KELLY-PALMER,	)	INSTRUCTIONS
	)	
15 Defendant.	)	
	)	
16	)	

17 TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND  
18 STEWART YOUNG, ASSISTANT UNITED STATES ATTORNEY.

19 Francisco Kelly-Palmer, by and through his counsel, Sara M. Peloquin and Federal Defenders of San  
20 Diego, Inc., and pursuant to Fed. R. Crim. P. 30, requests that the Court instruct the jury on the law as set  
21 forth herein. Mr. Kelly-Palmer also requests leave to offer further jury instructions as may become relevant  
22 during the course of the trial.

23 Respectfully submitted,

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25 Dated: September 15, 2008  
26 /s/ Sara M. Peloquin  
**SARA M. PELOQUIN**  
Federal Defenders of San Diego, Inc.  
Attorneys for Mr. Kelly-Palmer  
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Mr.Kelly-Palmer requests the following jury instructions from the Ninth Circuit Manual of Model Jury Instructions Criminal (West 2003) [hereinafter 9th Cir. Crim. Jury Instr.].

Modifications to the Ninth Circuit Model Jury Instructions are indicated in bold.

**INSTRUCTIONS AT THE END OF THE CASE**

1. 9th Cir. Crim. Jury Instr. **3.1** (Duties of Jury to Find Facts and Follow Law);
2. 9th Cir. Crim. Jury Instr. **3.2** (Charge Against Defendant Not Evidence — Presumption of Innocence — Burden of Proof);
3. 9th Cir. Crim. Jury Instr. **3.3** (Defendant's Decision Not to Testify);
4. 9th Cir. Crim. Jury Instr. **3.4** (Defendant's Decision to Testify);
5. 9th Cir. Crim. Jury Instr. **3.5** (Reasonable Doubt — Defined);
6. 9th Cir. Crim. Jury Instr. **3.6** (What Is Evidence);
7. 9th Cir. Crim. Jury Instr. **3.7** (What Is Not Evidence);
8. 9th Cir. Crim. Jury Instr. **3.8** (Direct and Circumstantial Evidence);
9. 9th Cir. Crim. Jury Instr. **3.9** (Credibility of Witnesses);
10. 9th Cir. Crim. Jury Instr. **3.10** (Evidence of Other Acts of Defendant or Acts and Statements of Others);
11. 9th Cir. Crim. Jury Instr. **3.11** (Activities Not Charged);
12. 9th Cir. Crim. Jury Instr. **3.20** (Jury to Be Guided by Official English Translation/Interpretation);
13. 9th Cir. Crim. Jury Instr. **4.1** (Statements by Defendant) (if statement is introduced);
14. 9th Cir. Crim. Jury Instr. **4.3** (404(b) Other Crimes, Wrongs or Acts of Defendant);
15. 9th Cir. Crim. Jury Instr. **4.17** (Opinion Evidence, Expert Witness);
16. 9th Cir. Crim. Jury Instr. **4.18** (Summaries Not Received in Evidence);
17. 9th Cir. Crim. Jury Instr. **4.19** (Charts and Summaries in Evidence);
18. 9th Cir. Crim. Jury Instr. **5.9** (Knowingly-Defined);
19. 9th Cir. Crim. Jury Instr (2007). **9.5** (Elements of the Offense);
20. 9th Cir. Crim. Jury Instr. **7.1** (Duty to Deliberate);
21. 9th Cir. Crim. Jury Instr. **7.2** (Consideration of Evidence);

22. 9th Cir. Crim. Jury Instr. 7.3 (Use of Notes);
23. 9th Cir. Crim. Jury Instr. 7.4 (Jury Consideration of Punishment);
24. 9th Cir. Crim. Jury Instr. 7.5 (Verdict Form) (modified as indicated);
25. 9th Cir. Crim. Jury Instr. 7.6 (Communication with the Court);

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 1

3 **3.1 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW**

4  
5 Members of the jury, now that you have heard all the evidence, it is my duty to instruct you  
6 on the law which applies to this case. A copy of these instructions will be available in the jury room  
7 for you to consult.

8 It is your duty to find the facts from all the evidence in the case. To those facts you will apply  
9 the law as I give it to you. You must follow the law as I give it to you whether you agree with it or  
10 not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or  
11 sympathy. That means that you must decide the case solely on the evidence before you. You will  
12 recall that you took an oath promising to do so at the beginning of the case.

13 In following my instructions, you must follow all of them and not single out some and ignore  
14 others; they are all equally important. You must not read into these instructions or into anything the  
15 court may have said or done any suggestion as to what verdict you should return—that is a matter  
16 entirely up to you.

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28 REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO.   2  

3 **3.2 CHARGE AGAINST DEFENDANT NOTEVIDENCE—PRESUMPTION OF**  
4 **INNOCENCE—BURDEN OF PROOF**

5 The indictment is not evidence. The defendant has pleaded not guilty to the charge. The  
6 defendant is presumed to be innocent and does not have to testify or present any evidence to prove  
7 innocence. The government has the burden of proving every element of the charge beyond a  
8 reasonable doubt.

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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 3

3 **3.3 DEFENDANT'S DECISION NOT TO TESTIFY**

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5 A defendant in a criminal case has a constitutional right not to testify. No presumption of  
6 guilt may be raised, and no inference of any kind may be drawn, from the fact that the defendant did  
7 not testify.

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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 4

3 **3.4 DEFENDANT'S DECISION TO TESTIFY**

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5 The defendant has testified. You should treat this testimony just as you would the testimony  
6 of any other witness.

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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 5

3 **3.5 REASONABLE DOUBT—DEFINED**

4  
5 Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the  
6 defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

7 A reasonable doubt is a doubt based upon reason and common sense and is not based  
8 purely on speculation. It may arise from a careful and impartial consideration of all the  
9 evidence, or from lack of evidence.

10 If after a careful and impartial consideration of all the evidence, you are not convinced  
11 beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not  
12 guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you  
13 are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the  
14 defendant guilty.

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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO.   6  

3 **3.6 WHAT IS EVIDENCE**

4  
5 The evidence from which you are to decide what the facts are consists of:

6 (1) the sworn testimony of any witness;

7 (2) the exhibits which have been received into evidence; and

8 (3) any facts to which all the lawyers have stipulated.

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28 REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 7

3 **3.7 WHAT IS NOT EVIDENCE**

4  
5 In reaching your verdict you may consider only the testimony and exhibits received into  
6 evidence. Certain things are not evidence and you may not consider them in deciding what the  
7 facts are. I will list them for you:

- 8 1. Arguments and statements by lawyers are not evidence. The lawyers are not  
9 witnesses. What they have said in their opening statements, [will say in their]  
10 closing arguments and at other times is intended to help you interpret the evidence,  
11 but it is not evidence. If the facts as you remember them differ from the way the  
12 lawyers state them, your memory of them controls.
- 13 2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their  
14 clients to object when they believe a question is improper under the rules of  
15 evidence. You should not be influenced by the question, the objection, or the court's  
16 ruling on it.
- 17 3. Testimony that has been excluded or stricken, or that you have been instructed to  
18 disregard, is not evidence and must not be considered. In addition some testimony  
19 and exhibits have been received only for a limited purpose; where I have given a  
20 limiting instruction, you must follow it.
- 21 4. Anything you may have seen or heard when the court was not in session is not  
22 evidence. You are to decide the case solely on the evidence received at the trial.

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28 REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 8

3 **3.8 DIRECT AND CIRCUMSTANTIAL EVIDENCE**

4  
5 Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as  
6 testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain  
7 of facts from which you could find that another fact exists, even though it has not been proved  
8 directly. You are to consider both kinds of evidence. The law permits you to give equal weight to  
9 both, but it is for you to decide how much weight to give to any evidence.

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COURT'S INSTRUCTION NO. \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 9

**3.9 CREDIBILITY OF WITNESSES**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness's testimony;
6. the reasonableness of the witness's testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

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GIVEN AS MODIFIED \_\_\_\_\_

REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 10

3 **3.10 EVIDENCE OF OTHER ACTS OF DEFENDANT OR ACTS**  
4 **AND STATEMENTS OF OTHERS**

5 You are here only to determine whether the defendant is guilty or not guilty of the  
6 charge[s] in the indictment. Your determination must be made only from the evidence in the  
7 case. The defendant is not on trial for any conduct or offense not charged in the indictment. You  
8 should consider evidence about the acts, statements, and intentions of others, or evidence about  
9 other acts of the defendant, only as they relate to this charge against this defendant.

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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 11

3 **3.11 ACTIVITIES NOT CHARGED**

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5 The defendant is on trial only for the crime[s] charged in the indictment, not for any other  
6 activities.

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COURT'S INSTRUCTION NO. \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 12

**3.20 JURY TO BE GUIDED BY OFFICIAL  
ENGLISH TRANSLATION/INTERPRETATION**

Languages other than English have been used during this trial.

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.

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GIVEN AS MODIFIED \_\_\_\_\_

REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 13

3 **4.1 STATEMENTS BY DEFENDANT**

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5 You have heard testimony that the defendant made a statement. It is for you to decide (1)  
6 whether the defendant made the statement, and (2) if so, how much weight to give to it. In  
7 making those decisions, you should consider all of the evidence about the statement, including  
8 the circumstances under which the defendant may have made it.

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28 REFUSED \_\_\_\_\_



1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 14

3 **4.3 OTHER CRIMES, WRONGS OR ACTS OF DEFENDANT**

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5 You have heard evidence of other [crimes] [acts] [wrongs] engaged in by the defendant.  
6 You may consider that evidence only as it bears on the defendant's [e.g., motive, opportunity,  
7 intent, preparation, plan, knowledge, identity, absence of mistake or accident] and for no other  
8 purpose.

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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 15

3 **4.17 OPINION EVIDENCE, EXPERT WITNESS**

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5 You have heard testimony from persons who, because of education or experience, are  
6 permitted to state opinions and the reasons for their opinions.

7 Opinion testimony should be judged just like any other testimony. You may accept it or  
8 reject it, and give it as much weight as you think it deserves, considering the witness' education  
9 and experience, the reasons given for the opinion, and all the other evidence in the case.

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28 REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 16

3 **4.18 SUMMARIES NOT RECEIVED IN EVIDENCE**

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5 Certain charts and summaries have been shown to you in order to help explain the facts  
6 disclosed by the books, records, and other documents which are in evidence in the case. They are  
7 not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures  
8 shown by the evidence in the case, you should disregard these charts and summaries and  
9 determine the facts from the underlying evidence.

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28 REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 17

3 **4.19 CHARTS AND SUMMARIES IN EVIDENCE**

4  
5 Certain charts and summaries have been received into evidence. Charts and summaries  
6 are only as good as the underlying supporting material. You should, therefore, give them only  
7 such weight as you think the underlying material deserves.

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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 18

3 **5.6 KNOWINGLY — DEFINED**

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5 An act is done knowingly if the defendant is aware of the act and does not [act] [fail to  
6 act] through ignorance, mistake, or accident. [The government is not required to prove that the  
7 defendant knew that [his] [her] acts or omissions were unlawful.] You may consider evidence of  
8 the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether  
9 the defendant acted knowingly.

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28 REFUSED \_\_\_\_\_

COURT'S INSTRUCTION NO. \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 19

**9.5 DEPORTED ALIEN FOUND IN UNITED STATES  
(8 U.S.C. § 1326(a))**

The defendant is charged in the indictment with being an alien who, after deportation, was found in the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was deported from the United States;

Second, after deportation, the defendant voluntarily entered the United States;

Third, when the defendant entered the United States he knew that he was in the United States and knowingly remained;

Fourth, the defendant was found in the United States without having obtained the consent of the Attorney General or Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant was an alien at the time of defendant's entry into the United States.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

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GIVEN AS MODIFIED \_\_\_\_\_

REFUSED \_\_\_\_\_

COURT'S INSTRUCTION NO. \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 20

**7.1 DUTY TO DELIBERATE**

When you begin your deliberations, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

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GIVEN AS MODIFIED \_\_\_\_\_

REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 21

3 **7.2 CONSIDERATION OF EVIDENCE**

4  
5 Your verdict must be based solely on the evidence and on the law as I have given it to you  
6 in these instructions. However, nothing that I have said or done is intended to suggest what your  
7 verdict should be—that is entirely for you to decide.

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28 REFUSED \_\_\_\_\_



1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 22

3 **7.3 USE OF NOTES**

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5 Some of you have taken notes during the trial. Whether or not you took notes, you should  
6 rely on your own memory of what was said. Notes are only to assist your memory. You should  
7 not be overly influenced by the notes.

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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 23

3 **7.4 JURY CONSIDERATION OF PUNISHMENT**

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5 The punishment provided by law for this crime is for the court to decide. You may not  
6 consider punishment in deciding whether the government has proved its case against the  
7 defendant beyond a reasonable doubt.

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28 REFUSED \_\_\_\_\_

1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 24

3 **7.5 VERDICT FORM**

4 (modified as indicated)

5  
6 A verdict form has been prepared for you. ~~If~~ After you have reached unanimous  
7 agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and  
8 date it and advise the Court that you are ready to return to the courtroom.

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10 (As written, the instruction creates a presumption that the jury shall  
11 reach a verdict. The requested modification clearly instructions that the  
12 verdict form is to be used only *if* the jury reaches a unanimous verdict.)  
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1 COURT'S INSTRUCTION NO. \_\_\_\_\_

2 DEFENDANT'S PROPOSED INSTRUCTION NO. 25

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4 **7.6 Communication with Court**

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6 If it becomes necessary during your deliberations to communicate with me, you may send  
7 a note through the bailiff, signed by your foreperson or by one or more members of the jury. No  
8 member of the jury should ever attempt to communicate with me except by a signed writing, and  
9 I will respond to the jury concerning the case only in writing, or here in open court. If you send  
10 out a question, I will consult with the lawyers before answering it, which may take some time.  
11 You may continue your deliberations while waiting for the answer to any question. Remember  
12 you are not tell anyone -- including me -- how the jury stands, numerically or otherwise, on the  
13 question of guilt of the defendant, until after you have reached a unanimous verdict or have been  
14 discharged.

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